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No. 946

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEONARD M. BERNARD AND JAMES B. JACKSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a–19a) is reported at 287 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1961 (Pet. 1a) and a petition for rehearing was denied on April 6, 1961 (Pet. 18a). The petition for a writ of certiorari was filed on May 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in telling the jury, near the end of the trial,

that it might consider all the evidence as having been received against all defendants, where the court's final charge made it clear that the acts and declarations of each defendant should be considered only as to him unless the jury was satisfied beyond a reasonable doubt that the evidence showed a common plan or design.

2. Whether the trial court erred in admitting in evidence the government expert's summaries of unreported income, where each item was clearly established by testimonial or documentary evidence, and where the court gave careful "guarding instructions" as to the use to which the jury could properly put the summaries.

3. Whether the trial court erred in admitting in evidence certain records, kept in the regular course of business, under the federal shop-book statute, 28 U.S.C. 1732.

4. Whether the trial court erred in excising, as required by 18 U.S.C. 3500, those portions of a government witness' statement which did not relate to the witness' testimony on direct examination, before turning the statement over to defense counsel for cross-examination purposes.

STATUTES INVOLVED

Section 145 of the Internal Revenue Code of 1939 provides in pertinent part:

> SEC. 145. PENALTIES.
>
> * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, ac-

count for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. (1952 ed.) 145(b))

28 U.S.C. 1732(a) provides:

SEC. 1732. RECORD MADE IN REGULAR COURSE OF BUSINESS; PHOTOGRAPHIC COPIES.

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

* * * * *

STATEMENT

On March 4, 1955, petitioners, together with Charles E. Bernard and Adelaide Locke Adsit, were indicted in the United States District Court for the Northern District of Illinois for the wilful attempted evasion of a large part of the 1948 income taxes of Bernard Bros., Inc. (hereinafter referred to as "the corporation"), by filing a false and fraudulent corporate tax return (R. 1, 5).[1] The government filed detailed bills of particulars, alleging specific items of unreported income totaling $78,053.82, which were said to have been received from "bonuses on the sale of 215 new automobiles to thirteen different customers of the corporation" (R. 6); and alleging the name of each customer, the date of each sale, the amount of the unreported income received in cash as a bonus on each of those sales, the person who made each bonus payment, and the agent of the corporation to whom each was made (R. 6-23). After a five-week trial before a jury in 1959, petitioners and Charles Bernard were found guilty as charged, the court having directed a verdict of not guilty as to Mrs. Adsit (R. 3, 1981, 2010, 2015-2016). Petitioner Leonard Bernard was sentenced to eighteen months in prison and fined

[1] The appellants' appendix in the court below, consisting of four volumes with pages numbered 1 to 2,030, is designated by the symbol "R." "Gov. App." refers to the government's appendix in the court of appeals.

$10,000; Charles Bernard was sentenced to six months and one day in prison and fined $5,000; and petitioner James Jackson was placed on probation for two years (R. 2019–2023). The court of appeals reversed the conviction of Charles Bernard for insufficient evidence and affirmed as to the two petitioners (Pet. 2a, 17a).

The evidence may be summarized as follows:

During the year 1948, the corporation conducted business as a dealer and distributor of automobiles in Evanston, Illinois (R. 1991). Leonard Bernard was president of the corporation, Charles Bernard was vice-president, James Jackson was treasurer (R. 1992), and Mrs. Adsit served as secretary to Leonard Bernard and as cashier (R. 86, 1098, 1492). Although Leonard Bernard stated to the Treasury agents during their investigation that everything he or the corporation had collected from the sale of cars was reflected on the books and the corporate income tax return (R. 43), the investigation disclosed an elaborate scheme by which many cars were sold for a cash bonus or premium ("overage") in addition to the invoice price recorded on the books and reflected in the corporate tax return. For example, one Gallagher purchased 35 cars on behalf of Nichols Motor Company from the corporation in 1948, usually dealing with Leonard Bernard. The corporation received a total "overage" (in excess of the prices shown on the sales invoices) of $10,530.71 on these cars (R. 83, 1995, 1997–1998). One Antonucci purchased fifteen new cars from the corporation during 1948, usually dealing with Jackson, on each of which he paid a minimum "overage" of $250 in addition to the invoice price (R. 778–782,

1995, 2001). He testified that in making the payments he would "count out the list price and count out the overage on the side" (R. 783–784). When Antonucci bought a car for his personal use, he was obliged to pay a premium of $550 over the invoice price (R. 784). One Volante purchased seven cars from the corporation and in each case—pursuant to an agreement between himself and George Smith, the corporation's sales manager—paid Smith $400 in cash over the invoice price (R. 1576).

When Smith sold cars he turned over to the cashier, Mrs. Adsit, the amount of money necessary to cover the invoice price and gave the "overage" to petitioner Leonard Bernard in cash (R. 1492). If Leonard Bernard was out of town, Smith—acting on Leonard Bernard's instructions—would either hold the cash until he returned, or mail it to him (R. 1495, 1500). On one occasion Smith sent the cash by registered mail, but never did so again because Leonard Bernard called him on the phone and instructed him not to (R. 1495–1496). Leonard Bernard sold more cars involved in "overage" transactions than anyone else in the corporation (R. 80–83, 462–465, 732, 887, 890, 1033, 1041, 1096, 1377–1378), but petitioner Jackson also participated in such transactions and in some instances accepted payment for the cars (R. 732, 777, 890, 1041, 1098). Five other witnesses, in addition to Gallagher, Antonucci and Volante, testified to similar transactions, all involving over-invoice bonus payments made in cash either to one of petitioners, Charles Bernard, Adelaide Locke Adsit, or George Smith (R. 738, 886–888, 893–898, 976–979, 1033–1040,

1095–1099, 1103, 1136–1149, 1380, 1407–1419, 1561–1576, 1997–2003).[2]

Since the corporate books, on which only the selling prices shown on the invoices were entered (R. 59–61), were in perfect agreement with the tax return (R. 46, 59)—which was signed by both petitioners (R. 1991)—none of the under-the-table "premiums" or "overages" were reported as income. The total amount of income thus proved to have been suppressed (involving 103 cars) was $35,108.06 (R. 1995–2003).

ARGUMENT

1. Petitioner's primary contention (Pet. 14–19), that the trial court erred in telling the jury that it might consider all of the evidence (with certain specified exceptions) as having been received against all of the defendants (R. 1816), is plainly without merit. Standing alone, this statement is not complete since, before evidence relating to one defendant can be considered against other defendants, the jury must find either a conspiracy or a common plan or design. But petitioners were clearly not prejudiced, since in his final charge to the jury the trial judge specifically explained this statement in instructing the jury that it could consider the acts and declarations of each of the defendants against each of the other defendants, only if it was satisfied beyond a reasonable doubt "that there was a common plan or

[2] The purchasers of the cars involved in the "overage" transactions were usually given false names on the corporation's records, often names of persons related to the purchaser or connected with the Bernards (see, *e.g.*, R. 271, 1478).

design to engage in a general course of corporate business transactions of the type shown by the evidence. * * * On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt then you will consider the acts and declarations of each defendant only as to him and not as to any other defendant" (R. 1959–1960). Thus, contrary to petitioners' contention (Pet. 15), the trial judge left for the jury the determination whether the evidence proved any common plan or design.

It is well settled, as the court below pointed out (Pet. 9a), that the trial court's instruction was correct. "Although conspiracy be not charged, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all." *Davis* v. *United States*, 12 F. 2d 253, 257 (C.A. 5). Accord: *American Fur Co.* v. *United States*, 2 Pet. 358, 365; *Neal* v. *United States*, 185 F. 2d 441, 442 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Ladrey* v. *United States*, 155 F. 2d 417, 420 (C.A. D.C.), certiorari denied, 329 U.S. 723; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *Lee Dip* v. *United States*, 92 F. 2d 802, 803 (C.A. 9), certiorari denied, 303 U.S. 638. See also *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747; *United States* v. *S. B. Penick & Co.*, 136 F. 2d 413; 2 Wharton, *Criminal Evidence* (11th ed.), pp. 1108–1109; IV Wigmore, *Evidence* (3d ed.), Sec. 1078. *United States* v. *Pronger*, 287 F. 2d 498 (C.A. 7), and *Stirone* v. *United States*, 361 U.S. 212, relied upon by petitioners (Pet. 15–18), are plainly inap-

posite. In the *Pronger* case the comments of the trial judge "had the effect of telling the jury that the * * * common design * * * had been proved" (287 F. 2d at 500). In the case at bar that question was properly left to the jury (see *supra*, pp. 7–8). In the *Stirone* case, the trial court permitted the jury to find the defendant guilty of a substantive offense not charged in the indictment, with the result that the government was, in effect, permitted to amend the indictment in the middle of the trial. Here, only a rule of evidence is involved; if the jury found a common design, the evidence could be considered with regard to all the defendants, but of course they could not be found guilty of the offense of conspiracy.

Petitioners' highly experienced trial attorneys could hardly have been taken by surprise by the trial court's ruling, because the indictment (R. 5) clearly implied a common design or plan to attempt to evade the corporate income tax and the three bills of particulars (see *supra*, p. 4) set forth a pattern of conduct by which the corporation did not charge "factory-suggested prices," but insisted upon receiving, and did receive, cash "overage." At trial, both petitioners were shown by the direct evidence of numerous witnesses, corroborated by documentary evidence, to have been parties to the plan to evade taxes.[3]

[3] Petitioners (Pet. 19) raise the frivolous question whether the "overages" constituted embezzled funds, extorted funds, or gratuities. Petitioners attempt (Pet. 3) to characterize the "overages" as "cash gratuities in excess of sales prices for automobiles sold by their employer" which were retained by the particular employee who made the sale. But, as the trial court instructed the jury, "Moneys received from the sale of

2. Petitioners claim (Pet. 20) that the trial court erred in admitting in evidence the summaries of unreported income prepared by the government's expert accountant (see R. 1997–2003). It is well settled, however, that summaries of this kind are admissible when based upon testimony and documents introduced in evidence. *United States* v. *Kelley*, 105 F. 2d 912, 918 (C.A. 2); *Graves* v. *United States*, 191 F. 2d 579, 584 (C.A. 10); *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4), certiorari denied, 340 U.S. 930; *Hanson* v. *United States*, 186 F. 2d 61, 67 (C.A. 8); cf. *Holland* v. *United States*, 348 U.S. 121, 127–128; *United States* v. *Johnson*, 319 U.S. 503, 519. The trial judge gave careful "guarding instructions" (*Holland* v. *United States, supra*) as to the weight to be attached to the testimony of the government's expert (R. 1960); and as to the use to which the government's summaries might be put (R. 1658–1659), pointing out that they had "no independent value" and must be rejected by the jury to the extent that the underlying testimony or documents were rejected (R. 1961). Petitioners, of

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corporate property by corporate officers or employees acting in the course of their duties constitute corporate receipts" (R. 1958). The "overages" were obviously a part of the consideration for the sale of the cars, and direct evidence showed that they were not retained by the employees but were turned over to Leonard Bernard, the president of the corporation (see *supra*, p. 6). And the trial court's instructions to the jury clearly required the jury to find that the "overages" were taxable to the corporation before it could find the defendants guilty (R. 1956–1958).

Equally frivolous is the contention (Pet. 19–20) that the trial court erred in refusing to instruct the jury that the guilt or innocence of each defendant must be determined separately, since the jury was so instructed (R. 1964–1965).

course, had the right to introduce their own charts and summaries (R. 1931), but for reasons of their own chose not to take advantage of the opportunity.

The record does not support the assertion (Pet. 20) that the government's expert improperly made arbitrary appraisals of the evidence. There was little room for any evaluation of conflicting evidence since the only conflict was a slight one involving a series of fourteen transactions where the expert relied on documentary evidence rather than a witness' recollection (R. 1766–1780). If the witness' oral testimony had been followed exclusively, the unreported income attributed to the corporation would have been $10.53 more; if the documentary evidence or oral testimony had been used, depending on which was most favorable to defendants in each instance, the unreported income would have been $419.26 less (R. 1643–1647). Clearly, this conflict was not of substantial importance.

3. Petitioners contend (Pet. 21) that the trial court erred in admitting in evidence certain records—mostly belonging to the Nichols Motor Company[4] which pur-

[4] Gordon Nichols, who had been manager and co-owner of the Nichols Company, testified that its purchase journal had been kept in the regular course of business of the company during 1948 (R. 71). The bookkeeper of the company testified that she had maintained that record; that it was all in her own handwriting; that the entries therein were true and correct to the best of her knowledge; that the underlying sources of information for the entries were stock cards which were made up for each car, the invoices delivered with the cars, or the automobiles themselves; that, when the serial number was obtained from either the car or the invoice, it would be entered on the stock card which was the basis of all the business transactions of the Nichols company and which was made out for all the cars

chased cars from the Bernard corporation—under the federal shop-book statute (28 U.S.C. 1732) on the ground that they were false and untrustworthy. The only falsity specifically claimed by petitioners relates to the name of the person who, according to the books of the Nichols Motor Company, was the owner of a car sold to that company (R. 187–188). Actually, the car was bought from the Bernard corporation. This is, however, a matter which did not relate to the central issue of the price at which the car was sold and was caused by the defendants themselves, since this information apparently came from an invoice supplied to Nichols by the Bernard corporation (see R. 541–542). This minor falsity in one entry and the alleged untrustworthiness of other entries in some respects could have been used—and indeed was used (Gov. App. 47)—by petitioners in an attempt to impress the jurors with the lack of credibility of the evidence. However that may be, the admissibility of the records was clearly not affected. *Palmer* v. *Hoffman*, 318 U.S. 109, 112, 115; *Bodnar* v. *United States*, 248 F. 2d 481, 482 (C.A. 6); *United States* v. *Wicoff*, 187 F. 2d 886, 889 (C.A. 7).

4. Petitioners urge finally (Pet. 21–24) that (a) the trial court misapplied the so-called "Jencks statute," 18 U.S.C. 3500, or (b) that statute is unconstitutional insofar as it restricts a defendant's right to examine the entire contents of written statements by

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on the premises (R. 535–542). Extensive cross-examination of the bookkeeper served only to show further her familiarity with the books and the regularity with which they were kept (R. 555–583).

a government witness "to show the relationship of a witness to the prosecution * * *" (Pet. 24). These contentions are without substance.

(a) The trial judge examined the statements of Sharp, the government witness in question, and, as 18 U.S.C. 3500 expressly requires, excised those portions which did not relate to the witness' testimony on direct examination before turning them over to defense counsel. At petitioners' request, the relevant materials were sealed and were before the court of appeals for its examination (R. 1857–1860). That court examined the exhibits, including the part excised by the trial judge in his *in camera* inspection, and concluded that all the excisions were proper (Pet. 19a).[5]

(b) There is no merit in the suggestion (Pet. 24) that 18 U.S.C. 3500 is unconstitutional as applied to these petitioners, because it narrows the range of the holding in *Jencks* v. *United States*, 353 U.S. 657. This Court has held that 18 U.S.C. 3500 was intended to limit the production of government papers to the very extent that the district court held in this case. The major concern of the statute is "with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which * * * do not relate to the subject matter of the witness' testimony." *Palermo* v. *United States*, 360 U.S. 343, 354. And the Court has likewise held that the Jencks statute, not the case, is the sole standard governing production of reports of a government

[5] At least as late as three weeks after the filing of the petition for certiorari, petitioners had not caused these exhibits to be certified to this Court.

witness. *Id.* at 355; *Rosenberg* v. *United States*, 360 U.S. 367, 369. If a statement of a government witness cannot be produced under the terms of 18 U.S.C. 3500, it "cannot be produced at all." *Palermo* v. *United States, supra*, 360 U.S. at 351.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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